Commission's program access rules[78] were promulgated in response to congressional concerns expressed in the 1992 Cable Act. Specifically, the Congress was concerned that vertically integrated program suppliers have the ability and incentive to favor their affiliated cable operators, allowing them to impair competition from existing competitors, new entrants, and new technologies (such as DBS).[79] This power, in turn, could result in higher prices and more limited consumer choice.[80] In 2007, the Commission extended the prohibition in its program access rules against exclusive contracts for any vertically integrated programming, finding that competing MVPDs need access to vertically integrated programming to remain viable substitutes to the incumbent cable operator in the eyes of consumers.[81]

35. Notwithstanding the program access rules, the Commission previously has found it necessary to impose additional transaction-related safeguards as conditions for approving vertical transactions between MVPDs and video programming networks. The record in those proceedings supported allegations that the vertical integration of certain video program networks with a particular MVPD would harm MVPD competition and enhance the integrated MVPD's market power despite the Commission's rules.[82] In 2003, in *News Corp.-Hughes*, the Commission found that News Corp. would have an increased incentive to adopt a strategy of temporary foreclosure to uniformly raise the price of its broadcast television and regional sports programming and to obtain other carriage concessions.[83] The Commission imposed several conditions to maintain the balance of bargaining power between News Corp. and other MVPDs at roughly pre-transaction levels.[84] In the *Adelphia Order* in 2006, the Commission imposed a similar but modified condition to deal with the potential anticompetitive use of

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discuss in connection with program carriage, Comcast can harm competition in video programming through "customer foreclosure" by limiting its programming rivals' access to its downstream customers.

[78] 47 C.F.R. §§ 76.1000-76.1004.

[79] Congress enacted Section 628 of the 1992 Cable Act to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." 1992 Cable Act § 2(a)(5), 47 U.S.C. § 548(a).

[80] *See* H.R. Conf. Rep. No. 102-862, at 93 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275; S. Rep. No. 102-92, at 28 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161.

[81] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17792-94, 17814 ¶¶ 1-3, 37 (2007) ("*2007 Program Access Order*").

[82] *See e.g., Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3294-96, ¶¶ 65-69, *News Corp.-Hughes Order*, 19 FCC Rcd at 511-12, ¶¶ 79-80.

[83] *News Corp.-Hughes Order,* 19 FCC Rcd at 514, ¶ 87. In that transaction, the Commission approved the application of General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Limited ("News Corp.") for consent to transfer control of various Commission licenses and authorizations held by Hughes and its wholly- or majority-owned subsidiaries to News Corp. Among News Corp.'s video programming assets at the time were 35 owned and operated broadcast stations, the Fox broadcast television network, ten national cable programming networks, and 22 regional cable programming networks.

[84] *Id.*

Comcast's RSNs to disadvantage MVPD competitors within Comcast's expanded footprint.[85] Most recently, in *Liberty Media-DIRECTV* in 2008, a similar condition was imposed and modified to address the potential harm arising from the transfer of control of DIRECTV from News Corp. to Liberty Media.[86] Accordingly, as part of our analysis, we will consider whether additional transaction-related safeguards are appropriate for this transaction.

36. Our analysis adapts an analytical framework employed in antitrust law.[87] First, we agree with commenters who assert that this transaction gives Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion, causing them to become less effective competitors. The record shows that the loss of Comcast-NBCU programming, including the programming contributed by NBCU, would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers. This is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes from other sources.[88]

37. As explained more fully in the Technical Appendix, the record evidence supports a finding that without Comcast-NBCU's suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast,[89] substantially harming those MVPDs that compete with Comcast in video distribution.[90] This conclusion

[85] *Adelphia Order*, 21 FCC Rcd at 8207, 8273-77, ¶¶ 5, 155-65. In the *Adelphia Order*, the Commission approved the acquisition by Time Warner Cable Inc. and Comcast Corporation of substantially all of the domestic cable systems owned or managed by Adelphia Communications Corporation.

[86] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3268, 3296-3304, ¶¶ 5, 72-84. In *Liberty Media-DIRECTV*, the Commission approved a series of transactions by which Liberty Media exchanged its ownership interest in News Corp. for News Corp.'s ownership interest in DIRECTV, resulting in Liberty Media having a *de facto* controlling interest in DIRECTV.

[87] *See* Andrew I. Gavil *et al.*, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 596 (2d. ed. 2008) (similar framework applied to analyze exclusion generally under the antitrust laws); *see generally Riordan and Salop*; *Krattenmaker and Salop*. Vertical mergers may have collusive as well as exclusionary effects; this analytical approach applies to exclusionary concerns. *See* Gavil *et al.* at 869 (suggesting collusive and exclusionary theories for analyzing a particular vertical merger).

[88] *See generally* Appendix B; *see also* Letter from Susan Eid, Senior Vice President, Government Affairs, DIRECTV, Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, and Ross J. Lieberman, Vice President of Government Affairs, ACA, to Julius Genachowski, Chairman, FCC (Nov. 23, 2010); Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Oct. 7, 2010). We evaluate exclusionary strategies involving blocks of programming as well as individual networks, in part because program access, affiliation, and retransmission consent negotiations increasingly are combined and cover larger bundles of programming than in the past.

[89] *See generally* Appendix B. The Applicants' argument that Fox's RSNs and team-owned RSNs are much closer substitutes to Comcast's RSNs than are any programming networks offered by NBCU does not refute the demonstrated loss of subscribers due to foreclosed access of marquee, non-replicable content. *See* Applicants' Opposition at 113.

[90] Moreover, cable programming is highly differentiated, so the foreclosed rivals cannot practically or inexpensively avoid the harm by substituting other programming. *See* DIRECTV Comments at 37 n.101; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 770, ¶ 34 & n.133 (2010) ("*Terrestrial Loophole Order*") (quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12139,

(continued….)

is consistent with our previous finding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been.[91] In addition, we find that Comcast-NBCU will negotiate more aggressively relative to the pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals. Unlike the pre-transaction NBCU, the integrated firm will take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals.[92]

38. We also find that Comcast-NBCU will have the power to implement an exclusionary strategy, notwithstanding that the programming would be owned by a joint venture between Comcast and GE. We evaluate this transaction as if Comcast will obtain all the profits generated by any exclusionary strategy by Comcast-NBCU because Comcast is acquiring the right to acquire sole ownership from GE and may exercise that right without further Commission approval. Moreover, we conclude that Comcast-NBCU's fiduciary duty to GE does not preclude exclusionary strategies that benefit Comcast-NBCU. For example, Comcast-NBCU could raise the price of programming to Comcast at the same time it raises prices to Comcast's rivals, thereby shifting to Comcast-NBCU some of the profits that Comcast earns by exercising market power in video distribution. As in past transaction review proceedings,[93] therefore, we find that duties imposed by corporate and securities laws do not adequately protect the public interest in this transaction.

39. Second, we find that successful exclusion (whether involving complete foreclosure or cost-raising strategies) of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power. We reach this conclusion by defining video distribution markets, and finding that Comcast could use exclusionary program access strategies to reduce competition from all significant current and potential rivals participating in those markets.[94] We also conclude that Comcast would find it profitable to engage in exclusionary conduct in these markets.

40. The Commission has analyzed the possible competitive harms of past vertical transactions on the distribution of video programming with relevant markets defined as all MVPD

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¶ 33 (2002)) ("cable programming—be it news, drama, sports, music, or children's programming – is not akin to so many widgets").

[91] *See Terrestrial Loophole Order*, 25 FCC Rcd at 768, ¶ 32 (citing *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 149); *see also 2007 Program Access Order*, 22 FCC Rcd at 17817-18, ¶ 39.

[92] *See* Appendix B.

[93] *News Corp.-Hughes Order*, 19 FCC Rcd at 510-513, 515-520, ¶¶ 76-83, 89-100; *see also Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3289-3294, ¶¶ 54-63.

[94] Even if the exclusionary conduct were limited to some but not all video distribution rivals, it would confer market power on Comcast so long as the foreclosed rivals constrain Comcast's pricing or the remaining rivals would go along with allowing output in the market to fall and the market price to rise rather than treating that outcome as an opportunity to compete more aggressively. These possibilities may permit Comcast to harm competition by targeting exclusionary strategies against specific rivals to the extent it can do so within the constraints of our program access rules.

services within local cable franchise areas.[95] We adopt the same definition here. We decline to include broadcast television in the definition of MVPD services.[96] The Commission has previously held that broadcast television is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence declined to broaden the MVPD product market.[97] This conclusion was based on factors including the degree of specialized programming provided, the number and diversity of channels offered, the fee charged for MVPD service, and the provision of premium movie channels, video on demand, and pay-per-view programming.[98]

41. We do not determine at this time whether online video competes with MVPD services. In the last few years, the Internet has evolved into a powerful method of video programming distribution.[99] We recognize that the amount of video content available on the Internet continues to increase significantly each year, and consumers are increasingly turning to the Internet to view video programming.[100] As discussed below, we conclude that regardless of whether online video is a complement or substitute to MVPD service today, it is potentially a substitute product.[101] When identifying market participants, therefore, we will include online video distributors as potential competitors into MVPD services markets.

42. The Commission has determined in the past that the relevant geographic markets for MVPD services are local, because consumers subscribe to MVPD services based on the choices available to them at their residences. Consumers are unlikely to change residences to avoid a small but significant

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[95] *See, e.g., Adelphia Order*, 21 FCC Rcd at 8235, ¶ 63; *Comcast-AT&T Order*, 17 FCC Rcd at 23281-82, ¶ 89. The Commission has defined MVPDs to include cable operators, DBS providers, and "overbuilders." *See, e.g., Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3280, ¶ 30; *Adelphia Order*, 21 FCC Rcd at 8234, ¶ 61. The term "overbuilders" refers to MVPDs, other than DBS providers, which compete against cable incumbents in their local franchise areas. We have also considered local exchange carriers that provide facilities-based video service, such as Verizon and AT&T, to be MVPDs. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009) ("*Thirteenth Annual Report*").

[96] We emphasize that we are defining programming distribution markets for the purpose of evaluating vertical foreclosure allegations. Our conclusion here does not preclude us from concluding, as we do below when evaluating harms from horizontal aspects of the transaction, that broadcast networks (which may also be distributed through MVPDs) compete with cable networks for inclusion in the package of programming that MVPDs distribute.

[97] *See News Corp.-Hughes Order*, 19 FCC Rcd at 509 ¶ 75 (citing *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Services*, Report, 5 FCC Rcd 4962, 5003, ¶ 69 (1990)); *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20607-09 ¶¶ 109-115.

[98] *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd at 5003, ¶ 69; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20607-08, ¶¶ 109-112.

[99] *See, e.g.*, Reply to Opposition to Petition to Condition or Deny of EarthLink at 3-8 (filed Aug. 19, 2010) ("EarthLink Reply"); DISH Reply at 4 (citing Report of Professor Simon J. Wilkie, *Competition and the Impact of the Proposed Comcast/NBCU Transaction*, Aug. 19, 2010, at ¶ 8); CWA Petition at 39-40.

[100] *Thirteenth Annual Report*, 24 FCC Rcd at 549-50, 613, ¶¶ 17, 150.

[101] Our concern here is with the anticipated development of online products that buyers would view as substitutes for what MVPDs offer today. In the event that the growth of online video distribution creates opportunities for price discrimination (*e.g.*, through bundling of services or product windowing) or leads to the development of new products (*e.g.*, disaggregated but searchable programming) that buyers do not view as close substitutes for MVPD services, we could define different or additional product markets in the future, which could be associated with different geographic markets and have different market participants.

increase in the price of MVPD service.[102] To simplify the analysis, however, we aggregate consumers who face the same choice of MVPD products into larger relevant geographic markets, as we have done in the past.[103] We have received no comments questioning the geographic market definition for the MVPD services market and find it appropriate to follow this approach in the current transaction. Because the major MVPD competitors in most areas are the local cable operator and the two DBS providers, and consistent with the Commission's approach in prior license transfer proceedings,[104] we conclude that the franchise area of the local cable operator is the relevant geographic market for purposes of our analysis.

43. Comcast has a substantial share of the total MVPD subscribers in each of its franchise areas.[105] In each of its franchise areas, moreover, Comcast competes with multiple MVPD rivals. They include two direct broadcast satellite firms, which participate in every such market, as well as overbuilders such as telephone companies offering MVPD services in some markets. Every MVPD rival that participates along with Comcast in these relevant markets purchases most if not all of Comcast-NBCU's programming, including most if not all of the programming to be contributed to Comcast-NBCU in this transaction. Comcast-NBCU has the ability to exclude all of Comcast's rivals from the JV's programming, whether by withholding the programming or raising its price, thereby harming competition in MVPD services in each of Comcast's franchise areas.

44. We further conclude that this anticompetitive exclusionary program access strategy would often be profitable for Comcast. Comcast's improved bargaining position would arise without additional expenditures—and so the resulting price increases would be profitable to Comcast's cable operations in all markets. However, because Comcast-NBCU would lose revenues from the foreclosed MVPD were it to withhold programming from that firm, the profitability of withholding strategies requires a more involved analysis. As demonstrated in the Technical Appendix, the permanent or temporary withholding of a local broadcast station from an MVPD that competes with Comcast in various geographic markets would be profitable for Comcast in many markets even if it did not result in a negotiated price increase. The increased profits from diverting customers to its MVPD business at pre-transaction prices would exceed the costs in lost revenues.[106] We conclude that the profitability analysis would be similar if Comcast were instead to withhold other marquee programming, whether individual

[102] *See Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3281, ¶ 32; *Adelphia Order*, 21 FCC Rcd at 8235, ¶ 64; *News Corp.-Hughes Order*, 19 FCC Rcd at 505, ¶ 62; *Comcast-AT&T Order*, 17 FCC Rcd at 23282, ¶ 90; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20610, ¶ 119.

[103] *See Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3281, ¶ 32; *Adelphia Order*, 21 FCC Rcd at 8235, ¶ 64; *News Corp.-Hughes Order*, 19 FCC Rcd at 505, ¶ 62.

[104] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3281, ¶ 32; *Adelphia Order*, 21 FCC Rcd at 8235-36, ¶ 64; *News Corp.-Hughes Order*, 19 FCC Rcd at 505, ¶ 62.

[105] The Applicants submitted data that provide the number of homes passed and video subscribers in every DMA where Comcast operates a cable system. *See* Applicants – Israel/Katz March Report, Atts. 10-13. From these data we calculate that Comcast serves a minimum of **[REDACTED]** of all homes and up to **[REDACTED]** of homes in some franchise areas. On average, **[REDACTED]** of all homes in the Comcast footprint subscribe to their video service as of January 1, 2010.

[106] For temporary foreclosure to be profitable in the context of MVPDs' access to programming, a significant number of subscribers must respond by switching MVPDs to obtain the integrated firm's programming without immediately switching back to the competitor once the foreclosure has ended. In markets exhibiting such consumer inertia, temporary foreclosure may be profitable even where permanent foreclosure is not. *See News Corp.-Hughes Order* at 511-12, ¶¶ 79-80.

networks or blocks that collectively have marquee status. Accordingly, we conclude that post-transaction Comcast will have the ability as well as the incentive to employ program access strategies to exclude all its MVPD rivals in every franchise area market, by raising prices in all markets or withholding programming in at least some. As a consequence, without conditions, the transaction would likely harm competition in every such market. Our conclusion is also supported by Comcast's past behavior in foreclosing competing MVPDs from accessing certain programs.[107]

45. We reject the Applicants' contention that in the *News Corp.-Hughes Order* and the *Adelphia Order* the Commission established general precedent that national programming networks never present a risk of foreclosure.[108] All adjudicatory findings are fact specific and based on the evidence in the record in a specific matter. Although the Commission found no evidence in the record of either of those transactions to support an effective or credible foreclosure strategy resulting in anticompetitive harms for the specific networks, we reach a different determination based on the record before us here.[109]

46. In the extensive record before us now, many credible concerns have been raised that post-vertical integration price increases will result for Comcast-NBCU national cable programming[110]—as well as for O&O programming and RSN programming. Video programming has evolved over time—today certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming.[111] Based on our analysis in the Technical Appendix, we also believe that the bargaining model used in the economic expert reports submitted by ACA and DISH supports the conclusion that the transaction could lead to price increases that target MVPD rivals.[112]

47. In fact, the Applicants' own documents support the conclusion that some of the national cable networks combined in this transaction have such loyal viewers that the transaction will allow

[107] *See, e.g.*, DIRECTV Reply at 39 n.120 (noting that from September 2009 through February 2010 DIRECTV did not carry Comcast's Versus network as a result of Comcast's demand that DIRECTV take down the channel at the expiration of the prior contract).

[108] *See* Applicants' Opposition at 155-56.

[109] Applicants' reliance on a post-transaction 12.8 percent market share of video programming thus is misplaced. *See* Applicants' Opposition at 160. Video programming is a differentiated product. An assessment of the consequences of foreclosure of the programming at issue in a particular transaction must be made on a case-by-case basis, considering whether the foreclosure to rival MVPDs of access to the specific programming networks offered by the parties to the transaction likely would result in the loss of subscribers to MVPDs having access. As the Commission concluded in the *Terrestrial Loophole Order*, the salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators. Rather, the relevant issue is the popularity of the particular programming that is withheld and how the inability of competing MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service. *See Terrestrial Loophole Order*, 25 FCC Rcd at 770, ¶ 34.

[110] *See* Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC (Nov. 5, 2010) at Exhibit 1, Table 3; DIRECTV Reply – Murphy Report at Exhibit 4 (**[REDACTED]**).

[111] *See, e.g.*, Derek Baine, *Cable Networks the Winner in Q2 Ad Revenue Race*, SNL Kagan, Aug. 20, 2010, at 2; *see also* DIRECTV Reply – Murphy Report at 16 & Exhibit 4.

[112] ACA Comments – Rogerson Report at 21-22; DIRECTV Comments – Murphy Report at 5-7. This model is similar to that proposed in the *News Corp.-Hughes Order* and used in the *Adelphia Order*, but our modeling has evolved since those transactions. *See* ACA Comments – Rogerson Report at 22.

Comcast-NBCU to extract higher rents from MVPDs. Comcast concedes as much when it stated that "**[REDACTED]**."[113] In addition, Comcast intends for the transaction to allow it to leverage **[REDACTED]**.[114]

48. We therefore conclude that conditions are necessary to ameliorate these potential harms for all categories of programming, as explained in more detail below.

**b. Remedial Conditions**

49. As a threshold matter, we conclude that our program access rules are insufficient to remedy the potential harm identified above. As the Commission found in the *News Corp.-Hughes Order*, a strategy of uniform price increases for video programming would not necessarily violate our current rules because the price increases would not involve discriminatory conduct.[115] To facilitate the combined entity's exercise of a uniform-price-increase strategy, Comcast could pay the same fees as its MVPD rivals or could choose to pay the highest fee that NBCU charges a competing MVPD. Therefore, our program access rules, which address discriminatory pricing, inadequately address the potential harms presented by the increased ability and incentive of Comcast-NBCU to uniformly raise Comcast's rivals' fees.[116]

50. To address this concern in prior transactions, the Commission has imposed baseball-style arbitration to maintain the pre-integration balance of bargaining power between vertically integrated programming networks and rival MVPDs.[117] We do so here, with modifications. We establish in Appendix A a mechanism whereby an aggrieved MVPD may choose to submit a dispute with Comcast-NBCU over the terms and conditions of carriage of Comcast-NBCU affiliated programming to commercial arbitration. As in prior transactions, the arbitrator is directed to pick between the final contract offers submitted by Comcast-NBCU and the complainant MVPD based on which offer best reflects the fair market value of the programming at issue. This neutral dispute resolution forum will prevent Comcast-NBCU from exercising its increased market power to force Comcast's MVPD rivals to accept either inordinate fee increases for access to affiliated programming or other unwanted programming concessions, and will effectively address price increase strategies that could otherwise be used to circumvent our program access rules.

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[113] *See* 31-COM-00000298, **[REDACTED]** at 35.

[114] *See id.* at 25, 30, 37.

[115] *See News Corp.-Hughes Order*, 19 FCC Rcd at 513-14, ¶¶ 84-87.

[116] In addition, our program access rules do not apply to broadcast programming. *See generally* 47 C.F.R. §§ 76.1001, 76.1003(d).

[117] *See News Corp.-Hughes Order*, 19 FCC Rcd at 552-53, 572-73, ¶¶ 175-76, 220-21.

51. After considering the record in this proceeding, we have modified our arbitration procedures from past transactions in order to make them more effective and less costly, for example by limiting the discovery that is presumptively available. We also require Comcast-NBCU to permit the MVPD to continue to carry the programming that is the subject of arbitration while the dispute is being resolved.[118]

52. While we previously have imposed an arbitration remedy only for RSN and broadcast programming, as we have noted recently,[119] the need for arbitration has grown as the market has changed. On the basis of the record in this proceeding, as well as past problems in defining the limits of remedies prescribed for particular categories of programming, we believe it prudent to extend the arbitration and standstill remedy to all Comcast-NBCU affiliated programming. The record supports allegations that certain national cable programming networks are marquee programming for which subscribers would switch to a different MVPD in order to regain access.[120] Accordingly, our public interest mandate requires that we extend the arbitration and standstill remedy to all such programming.

53. Applying the arbitration and standstill provisions to all programming eliminates the need for the Commission to draw lines among various cable networks that would pose significant practical and constitutional concerns. The application of the arbitration remedy to all affiliated cable network programming also avoids the need to reclassify networks as marquee or non-marquee if Comcast-NBCU were to shift programming from one network to another. In addition, Comcast-NBCU may invest in specific networks that may not be considered marquee today but that could evolve into marquee programming networks. Meanwhile, given the evidence in the record supporting the costs and burdens that the aggrieved MVPD must incur in order to use the arbitration and standstill remedies, we believe it unlikely that an MVPD would invoke this remedy for less critical programming.

54. We also extend the arbitration remedy to a wide array of programming types, including most movies and bonus features, which Comcast-NBCU makes available to any party, including Comcast's systems. The record here demonstrates that these aspects of video programming are necessary for MVPDs to compete in the evolving MVPD marketplace. We clarify that the program access conditions and arbitration remedies apply to high-definition (HD) feeds of any network whose standard definition (SD) feed is subject to the program access rules.[121] We further clarify that the program access conditions and arbitration remedies set forth in this Order also shall apply to video-on-demand (VOD) and pay-per-view (PPV) programming. The Commission previously has suggested that these formats are included under "video programming."[122] Because of their increasing importance to MVPD competition, we clarify that they are included in our remedy here.[123]

[118] We clarify that this standstill provision applies both to the continued provision of the linear programming to the affected MVPD for the duration of the dispute, as well as to the continued provision of the programming online, to avoid the harm to consumers that may result from removal of free online video programming in the event of a carriage dispute. *Cf.* Brian Stelter, *Internet Is a Weapon in Cable Fight*, N.Y. TIMES, Oct. 20, 2010, at B3, *available at* http://www.nytimes.com/2010/10/20/business/media/20hulu.html.

[119] Recently we have recognized the need to extend this remedy to other types of programming on a case by case basis. *See Terrestrial Loophole Order*, 25 FCC Rcd at 778, ¶ 48.

[120] *See supra* ¶ 36.

[121] *See* Application at 117.

[122] *See* 47 U.S.C. § 522(20) (defining "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station"). This definition was added to the Act by

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55. We follow our approach in the *Adelphia Order* by applying our program access conditions to the benefit of all MVPDs, not just those that compete directly with Comcast in the geographic markets that we have defined for the purpose of analyzing vertical aspects of the transaction threatening program access.[124] To successfully raise programming prices for Comcast's rivals, the JV would need to raise the prices charged not only to Comcast, but also to non-rival distributors outside its footprint. There are at least two reasons why this is the case. First, as discussed in the Technical Appendix, price increases could spread to MVPDs that do not directly compete with Comcast through the operation of "most favored nation" ("MFN") provisions in affiliation agreements. Second, prices to non-rival distributors might be used as "benchmark" evidence in proceedings brought by rivals (arguing either that the JV was improperly discriminating by charging higher rates to rivals of its affiliate than to non-rivals of its affiliate, or that the JV's prices to them were above fair market value).[125]

56. Commenters express concern about a number of other remedy-related issues. For example, some commenters argue that we should prohibit Comcast-NBCU from offering volume-based discounts for its video programming.[126] We find that such a prohibition is unnecessary here. The Commission's program access rules already contemplate that a complaint may be filed challenging volume-based pricing in certain circumstances. On the filing of such a complaint, a cable-affiliated programmer may be required "to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers . . . but may also

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the 1984 Cable Act, and the Commission has accordingly interpreted this term to mean programming comparable to that provided by broadcast television stations in 1984. *See Telephone Company-Cable Television Cross-Ownership Rules,* Second Report and Order, 7 FCC Rcd 5781, 5820, ¶ 74 (1992). The Commission has concluded that, "to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute 'video programming'." *See id.* at 5820-21, ¶ 74. The Commission found that "video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming." *See Telephone Company-Cable Television Cross-Ownership Rules,* Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 244, 296, ¶ 109 (1994).

[123] We decline the invitation of some commenters to extend our program access conditions to the so-called "transport market" for VOD and PPV programming. *See, e.g.,* Avail-TVN Comments at 6-10; Petition to Deny and Comments of the National Telecommunications Cooperative Association and the Western Telecommunications Alliance at 10 (filed Jun. 21, 2010) ("NTCA Petition"); FACT Comments at 22-23; WealthTV Petition at 11-15. We believe that the evidence in our record does not demonstrate that there is a transaction-related harm in the transport market. *See* Applicants' Opposition at 277-78. Furthermore, we agree with the Applicants that the ease of entry into transport and the existing alternatives for competing MVPDs negate Comcast-NBCU's ability to harm competition in this market. *See* Letter from Jonathan Friedman, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 3 (Dec. 3, 2010).

[124] *See Adelphia Order*, 21 FCC Rcd at 8274, ¶ 156; *see also 2007 Program Access Order*, 22 FCC Rcd at 17841, ¶ 72 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992-Sunset of Exclusive Contract Prohibition,* Report and Order, 17 FCC Rcd 12124, 12140-41, ¶¶ 36-39 (2002)).

[125] DIRECTV also states that the JV can benefit by weakening a current or potential rival even in markets where Comcast does not compete because reducing that rival's customer base in other markets would raise the rival's average cost of serving customers in Comcast's markets, thereby reducing the rival's competitive strength. *See* DIRECTV Comments at 39-40.

[126] *See, e.g.,* FACT Comments at 28-29.

identify non-cost economic benefits related to increased viewership."[127] Because the specific matter of volume-based discounts is adequately addressed by the Commission's program access rules, we find no basis to adopt conditions regarding this issue.

57. Other commenters express concerns about Comcast-NBCU's bundling of video programming in negotiating carriage with MVPDs. While potentially providing efficiencies such as lower prices, bundling may also harm competition, for example by facilitating anticompetitive exclusion. We are particularly concerned about the anticompetitive possibilities arising from bundling of marquee programming. According to our analysis, Comcast-NBCU's marquee programming includes at least its broadcast programming, its RSN programming, and its broad portfolio of national cable programming. Therefore, we permit MVPDs, in demanding a final offer from Comcast-NBCU, to demand a standalone offer for (1) broadcast programming, (2) RSN programming, (3) the bundle of all cable programming, and/or (4) any bundle that a Comcast-NBCU programmer has made available to a similar MVPD. The standalone offer requirement we adopt here, as in prior proceedings, will help to mitigate the potentially anticompetitive effects of bundling post-transaction by allowing MVPDs to unbundle those categories of marquee programming we have identified. This requirement also mitigates unreasonable bundling without preventing Comcast-NBCU from obtaining efficiencies in program packaging.

58. Finally, ACA argues that small and medium-sized MVPDs may be at particular risk.[128] We agree. Given the size of their subscriber bases and financial resources, small and medium-sized MVPDs may be less able to bear the costs of commercial arbitration than large MVPDs, thus rendering the remedy of less value to them. Therefore, we have modified our arbitration rules to make them more efficient and cost-effective, as explained above. We also specify that MVPDs with 1.5 million or fewer subscribers may choose to appoint an independent agent to bargain and (if necessary) arbitrate collectively on their behalf for access to Comcast-NBCU affiliated programming. In addition, we impose asymmetrical fee shifting to level the playing field. If an MVPD with 600,000 or fewer subscribers is the prevailing party in an arbitration, it shall be entitled to recover its legal fees and costs of arbitration. If it loses, however, it shall not be required to reimburse Comcast-NBCU's corresponding fees and costs.

59. Our arbitration condition is intended to push the parties towards agreement prior to a breakdown in negotiations. Final offer arbitration has the attractive "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator."[129] We find that the availability of an arbitration remedy will support market forces and help to prevent this transaction from distorting the marketplace.

### 2. Online Video Content

60. In this section, we examine the role of the Internet in the delivery of video programming, which has progressed from negligible just a few years ago to an increasingly mainstream role today. Major companies deliver video content over the Internet to consumers over websites and other applications. Consumers are more and more able to view this content not just on their television sets, but also on a multitude of other devices, such as PCs, tablets, and mobile phones. The amount of professional video that consumers watch over the Internet is still relatively small, but Internet viewing is popular and

[127] 47 C.F.R. § 76.1002(b)(3) note.

[128] ACA Comments at 44-45.

[129] STEVEN J. BRAMS, NEGOTIATION GAMES: APPLYING GAME THEORY TO NEGOTIATION AND ARBITRATION, 264 (2003).

growing. Parties on both sides of this proceeding agree that consumers are demanding the ability to watch video programming "anytime, anywhere" and that watching video over the Internet is becoming an important service that they demand.[130]

61. We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs,[131] through a variety of anticompetitive strategies. These strategies include, among others: (1) restricting access to or raising the price of affiliated online content; (2) blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to Comcast broadband subscribers; and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video.

62. We impose a set of measures carefully tailored to safeguard against these potential harms. The online video market is expanding, and has the potential to increase consumers' choice of video providers, enhance the mix and availability of content, drive innovation, and lower prices for OVD and MVPD services.[132] A robust OVD market also will encourage broadband adoption, consistent with the goals of the Commission's National Broadband Plan.[133]

#### a. Background

63. Internet delivery of video programming is an established and growing business. For example, Apple, Amazon and Walmart offer movies and television shows to rent or purchase by downloading them over the Internet. Netflix, which originally distributed DVDs through the mail, now also offers Internet streaming of movies and television shows. Major League Baseball, the National Basketball Association and the National Hockey League each offer subscription services that allow subscribers to watch live non-local games over the Internet. The websites of the four major broadcast networks each offer free, advertising-supported streaming video of most of their recent programming, and CBS offered live streaming of the preliminary rounds of the NCAA men's basketball championship tournament. Hulu and other websites offer advertising-supported streaming video of recent television programs and other programming.[134]

64. Services and devices capable of delivering online video to television sets are proliferating rapidly and are becoming easier to use.[135] For example, many game consoles (*e.g.*, Microsoft Xbox,

[130] *See, e.g.*, Application at 37; Applicants' Opposition at 56; DISH Petition at 2, 9.

[131] The issue of whether a certain type of OVD qualifies as an MVPD under the Act and our regulations has been raised in pending program access complaint proceedings. *See, e.g., VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint (Mar. 24, 2010). Nothing in this Order should be read to state or imply our determination on this issue.

[132] *See, e.g.*, EarthLink Petition at 12-17; Greenlining Petition at 40.

[133] *See* National Broadband Plan, Chapter 2 at 9-11. *See also* Bloomberg Response to Petitions to Deny and Comments at 21-22 (filed Jul. 21, 2010) ("Bloomberg Response"); FACT Comments at 7-9; FACT Reply at 13; Greenlining Response at 7-8.

[134] Hulu is a joint venture currently owned by News Corp., NBCU, Providence Equity Partners and The Walt Disney Company Application at 32-33. Hulu also recently introduced the Hulu Plus subscription service, which provides access to additional content for a monthly fee.

[135] Ian Olgeirson and Liza Castaneda, *Over-the-Top Threat Looms Despite Multichannel Penetration Gains*, SNL Kagan, Multichannel Market Trends at 2 (Jun. 29, 2010). *See also* 64-COM-00002078, **[REDACTED]**.

Nintendo Wii, and Sony PlayStation) and Blu-ray players allow viewers to rent programming over the Internet and view it on their television sets. Roku offers an inexpensive box that connects to a television set, allowing viewers to access Netflix and Major League Baseball, among other programming. Google has begun offering its GoogleTV application via its own box and other devices. Most of the major television set manufacturers now offer sets that allow access to various sites that provide programming over the Internet (*e.g.*, Netflix, Vudu).

65. Internet video viewing is growing. One half of American consumers watch some video over the Internet.[136] Although the amount of viewing is still relatively small—one estimate is that it makes up nine percent of all viewing[137]—it is clearly increasing.[138] The number of United States-based viewers in 2009 who watched video online grew 19 percent over 2008, and the number of "videos" watched increased 95 percent.[139] By 2010, the average user was online almost 97 hours per month, with "real-time entertainment" comprising almost half (45 percent) of all downstream Internet traffic.[140] During evening hours, this represented a 45 percent increase over 2009.[141] Netflix estimates that by the end of 2010, a majority of its subscribers will watch more content streamed over the Internet than delivered on physical DVDs.[142] Usage on mobile devices shows a similar pattern, with entertainment accounting for 45 percent of all data use and users staying online for almost 24 hours per month.[143]

66. Not surprisingly, then, the Internet figures prominently in the plans of many MVPDs and other OVDs. The Applicants and the commenters agree that consumers want to watch programming "anytime, anywhere"[144]—and that there is every reason to believe this trend will continue.[145] It is against

[136] *See Online and Time-Shifted Viewing Rises Significantly Among American Consumers*, Morpace Omnibus Report, Morpace Market Research and Consulting at 1-2 (Aug. 2010) (51 percent of consumers watched at least some video from an online source, and 23 percent of consumers used a streaming video source such as Netflix) ("Morpace Omnibus Report"); *The State of Online Video*, Pew Internet & American Life Project, Pew Research Center (Jun. 3, 2010), *available at* http://www.pewinternet.org/Reports/2010/State-of-Online-Video.aspx (finding from a June 2009 survey that 32 percent of adult Internet users watch movies or television shows online). *See also* 64-COM-00001565, **[REDACTED]**; 64-COM-00002275, **[REDACTED]**; 64-COM-00000788, **[REDACTED]**.

[137] Morpace Omnibus Report at 2.

[138] *See* 64-COM-00001565, **[REDACTED]**. *See generally The State of Online Video*, Pew Internet & American Life Project, Pew Research Center (Jun. 3, 2010). The Applicants note that online video viewing continues to accelerate, with more people watching more videos online for longer periods of time. Applicants' Reply at 56 n.148.

[139] comScore, The 2009 U.S. Digital Year in Review, A Recap of the Year in Digital Marketing, Feb. 2010. In December 2009, the Hulu website alone accounted for 1 billion streams and just under 100 million hours of viewing —an increase of 140 percent from the year before.

[140] Fall 2010 Global Internet Phenomena Report, Sandvine, Inc., at 11, 18 ("Sandvine Report"). "Real-time entertainment" is defined as streamed video and audio, peercasting, and place shifting (*e.g.*, via Slingbox). Twenty percent of the 45 percent came from Netflix alone, while YouTube made up only 10 percent of downstream Internet traffic during 2010. *Id.* at 15.

[141] *See id.* at 13 (42.7 percent during 2010; 29.5 percent during 2009).

[142] Netflix, Inc., *Netflix Announces Q3 2010 Financial Results* (press release), Oct. 20, 2010.

[143] Sandvine Report at 12 (real-time entertainment accounts for 44.8 percent of mobile traffic), 18.

[144] *See, e.g.*, Application at 37; Applicants' Opposition at 56; DISH Petition at 2, 9; DIRECTV Reply at 8-9.

this backdrop that we evaluate the claims of many commenters that the transaction will increase the Applicants' incentive and ability to take a variety of anticompetitive actions against other MVPDs and OVDs.

**b. Online Video Content to MVPDs**

67. *Positions of the Parties.* MVPD commenters argue that, because online video is becoming such an important part of the viewing experience, Comcast-NBCU will have the incentive and ability to discriminate against Comcast's MVPD rivals by raising prices for online access to affiliated video programming and/or refusing to provide it in the same time frame (generally known as the "window") or in the same quality (*e.g.* in standard definition as opposed to high definition).[146] This incentive extends beyond full length programming (both movies and television programs) to include programming-related enhancements, such as clips and bonus features.[147] DISH argues that its ability to offer online video is critical to maintaining its ability to compete with its MVPD rivals, noting that every major MVPD offers an online video service in addition to the linear channels it provides.[148] DIRECTV and others share these concerns.[149] Commenters also note that Comcast has a history of withholding programming from its rivals. For example, Comcast withholds its RSN in Philadelphia from both DISH and DIRECTV. Similarly, WOW!, which is a mid-sized MVPD, claims that it has had difficulty obtaining Comcast's online programming.[150]

68. Commenters also argue that Comcast could deny them access to important third-party content by entering into restrictive agreements with third-party programming providers.[151] They contend

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[145] Applicants' Opposition at 56.

[146] *See, e.g.*, DIRECTV Comments at 33-34; DISH Petition at 9-19; DISH Reply at 3-6; ACA Comments at 34-37; *see also* FACT Reply at 9-10. DISH alleges that NBCU has deliberately downgraded the quality of the video experience of DISH Network's online video platforms in comparison to NBCU's proprietary video platforms, such as Hulu and nbc.com. DISH Petition at 16 and Shull Declaration at ¶12; DISH Reply at 20. DISH also claims that Hulu requires the use of its proprietary online video player, which diminishes the ability of competitors to use better video player software technology; does not allow competitors the use of full metadata, such as show availability notes; and prohibits content distribution using new platforms and formats, such as the Apple iPad or HTML5. *See* DISH Petition at 17 and Jackson Declaration at ¶ 21. Under the condition we are adopting, insofar as Comcast-NBCU makes content available on the Comcast website or to Comcast or other MVPD subscribers, it must provide the same quality programming to other MVPDs, with no additional restrictions.

[147] DIRECTV Comments at 6; DISH Reply at 26.

[148] DISH Petition at 3, 6-9. These websites typically offer both content available to all users and content limited to the MVPD's subscribers (termed "authenticated" because subscribers need to be verified before accessing the content).

[149] *See, e.g.*, DIRECTV Reply at 8-9; ACA Comments at 34-37; FACT Comments at 8-9; FACT Reply at 10.

[150] Testimony of Colleen Abdoulah, Pres. and Chief Exec. Officer, WOW!, Hearing on An Examination of the Proposed Combination of Comcast and NBC Universal before the House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Transcript at 3, 4-5 (Feb. 4, 2010). In the *Terrestrial Loophole Order*, the Commission found several examples of MVPDs withholding affiliated content that the Commission's rules did not require them to sell to other MVPDs. *Terrestrial Loophole Order*, 25 FCC Rcd at 766-67, ¶ 30.

[151] *See, e.g.*, AOL Comments at 8; CWA Petition at iv, 48-49, 55; DIRECTV Comments at iv, 35; WealthTV Petition at 7, 35; EarthLink Petition at 22-23; Free Press Reply at 65; Greenlining Reply at ii, 32; Reply to Opposition to Petitions to Deny and Response to Comments of WealthTV at 31 n.101 (filed Aug. 19, 2010)
(continued....)

that Comcast could use its new control over the distribution of NBCU's content to enhance the popularity of the joint venture's online offerings, thereby increasing its ability to negotiate exclusive online rights from unaffiliated content providers.

69. The Applicants generally respond that they have no incentive to withhold online distribution rights from other MVPDs.[152] They do not, however, argue that their incentives to withhold such rights are any different than their incentives to withhold linear channels and other programming from their rivals.[153] With regard to entering into restrictive agreements with other independent programmers, the Applicants maintain that they lack the market power to coerce any programmer to enter into such arrangements, and they confirmed to Congress that they would not ask independent programmers to sign exclusivity deals with Comcast or with Comcast's TV Everywhere partners.[154]

70. *Discussion.* We conclude that, without conditions, the transaction would cause competitive harms to rival MVPDs and, ultimately, consumers. Online viewing is indisputably becoming an important service demanded by consumers—one that every major MVPD is offering its subscribers. Without access to online content on competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers. This reality will give Comcast-NBCU the incentive, similar to that discussed above, to withhold or otherwise discriminate in providing online rights to video programming in order to prevent Comcast's MVPD rivals from competing aggressively with it. And Comcast will gain an increased ability to act on this anticompetitive incentive through the acquisition of NBCU's video content.

71. We cannot rely on Comcast's assurances that it will not use its control of NBCU content anticompetitively. Comcast currently chooses to withhold content from its rivals, thereby contradicting its contentions that, for whatever theoretical reason, it would not do so in the future. For example, Comcast's refusal to provide the Philadelphia RSN is not due to a dispute about price or terms, but rather is merely Comcast's "long-standing business policy," as Comcast's own correspondence states.[155]

72. Therefore, we impose conditions, as described further in Appendix A, to ameliorate the potential competitive harms that could result from Comcast's control of Comcast-NBCU's online rights. As a condition of our approval of the transaction, we require Comcast-NBCU to provide to all other

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("WealthTV Reply"); Letter from Rep. Rick Boucher, U.S. House of Representatives, to Chairman Julius Genachowski, FCC, at 2 (Aug. 2, 2010) ("Rep. Boucher Letter"). *See also* Petition to Deny of Bloomberg L.P. at 67 (filed Jun. 21, 2010) ("Bloomberg Petition").

[152] Applicants' Opposition at 184; Applicants' Reply at 24-26.

[153] Instead, the Applicants claim that "online video is not a substitute for traditional linear MVPD service" and that "foreclosure of competing online video providers would not be profitable for the joint venture." Applicants' Opposition at 184. *See also* Applicants' Reply at 25.

[154] Statement of Brian L. Roberts, Chairman and Chief Executive Officer, Hearing on An Examination of the Proposed Combination of Comcast and NBC Universal before the House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Transcript at 56 (Feb. 4, 2010) (responding to question from Rep. Peter Welch).

[155] *See* DISH Reply, Attachment C (Letter from Amy B. Cohen, Vice President and Associate General Counsel, Comcast SportsNet, to Dave Shull, Senior Vice President, Programming, DISH Network L.L.C. (Jul. 23, 2010)). As Free Press notes, Comcast has also entered into at least one contract with a programmer that **[REDACTED]**. Free Press Reply at 16-17 (citing 20-COM-00000071 at 10).

MVPDs, at fair market value and non-discriminatory prices, terms and conditions, any affiliated content that it makes available online to Comcast's own subscribers or to other MVPD subscribers.[156]

73. We also conclude that Comcast-NBCU will have increased leverage to negotiate restrictive online rights from third parties, again to the detriment of competition. Comcast-NBCU's demand of restrictive online rights in exchange for carriage may also cause harms to consumer choice, diversity, and broadband investment.[157] The Applicants emphasize that the distribution of online rights is non-exclusive, and that a content provider is free to license its content to the online platforms of other MVPDs.[158] They have reiterated in this proceeding that they will adhere to this principle.[159] To ensure that the Applicants adhere to their commitments in this proceeding, and as a condition of our approval, we prohibit Comcast-NBCU from entering into restrictive agreements with third-party content providers regarding online rights, except under limited circumstances. We also prohibit Comcast-NBCU from impeding access to its own content by entering into overly restrictive agreements for online rights to that content. These conditions, described in greater detail in Appendix A, apply to a broad range of provisions that would impede distribution of video programming, including MFNs.

#### c. Online Video Content to Non-MVPDs

74. *Positions of the Parties.* A number of petitioners and commenters argue that non-MVPD OVDs (such as Hulu, Netflix, GoogleTV, and iTunes) already—or soon will—provide viable commercial alternatives to traditional MVPDs.[160] They argue that Comcast-NBCU will have the incentive and ability to harm these new OVDs by preventing or hindering them from delivering video content over the Internet. And they contend that the obstacles cited by the Applicants as impediments to the development of the OVD industry—network capacity constraints, content price, and content rights—can and are being overcome.[161]

75. The Applicants respond that they have neither the ability nor the incentive to withhold NBCU content or otherwise harm OVDs.[162] They argue that they will lack market power in any market

[156] This condition does not affect the rights of the Applicants to allow MVPDs to provide online content only to their subscribers as an "authenticated" service. It merely requires the Applicants to provide other MVPDs with the ability to provide their subscribers the same content that Comcast provides its subscribers (or other MVPDs' subscribers), on the same terms and conditions.

[157] We do not conclude that agreements giving specific video distributors exclusive rights to video content necessarily or invariably harm competition, only that absent conditions, the transaction before us gives Comcast an increased ability and incentive to reach such agreements for anticompetitive reasons.

[158] We note that the TV Everywhere principles, which Comcast helped develop and espouses, provides that "TV Everywhere is open and non-exclusive; cable, satellite or telco video distributors can enter into similar arrangements with other programmers." Application at 59 n.100, 61.

[159] Letter from James L. Casserly, Counsel for Comcast, to Marlene Dortch, Secretary, FCC (Aug. 20, 2010).

[160] *See, e.g.,* CWA Petition at 39-43; EarthLink Petition at 13-14, 27-31; EarthLink Reply at 3-6; FACT Reply at 9-10; Free Press Petition - Cooper/Lynn Declaration at 53-59; Cooper Declaration - Marvin Amori Study at 10-15; Petition to Deny of Public Knowledge at 8-9 (filed Jun. 21, 2010) ("Public Knowledge Petition"). *See also* DISH Reply at 2; Sen. Franken Letter at 3 (stating that online video poses an "existential threat" to cable providers); Comments of the American Antitrust Institute at 17 (filed Jun. 21, 2010) ("AAI Comments") (viewing online video distribution as an emerging platform that competes with the existing platform of content delivered through MVPDs).

[161] EarthLink Reply at 8-12.

[162] *See* Application at 122-26; Applicants' Opposition at 185-186.

for online video content[163] and that withholding Comcast-NBCU content would not significantly harm any OVD. Because Comcast reaches only 24 percent of the country's households, the Applicants argue, withholding content from OVDs would be unprofitable.

76. More generally, the Applicants make two overarching arguments. First, they claim that Internet viewing does not compete with MVPD service but is a supplement.[164] People use the Internet to watch shows they have missed or at different places, they say, and there is little evidence of cord-cutting.[165] Second, they argue that OVDs cannot exist as a profitable business,[166] because (1) it is too expensive for OVDs to purchase professional video from the content owners, who make significantly more money by selling to the traditional MVPDs; and (2) there is insufficient Internet capacity for OVDs to provide a full substitute for MVPD service, which would involve over 250 hours of viewing per month for each household.[167]

77. Several commenters dispute these assertions. Commenters argue that OVDs need NBCU content to be effective competitors. They contend that cord-cutting is indeed occurring. Further, they say, Comcast's own documents show that it is concerned about the competitive threat posed by OVDs.[168] DISH argues that regardless of whether online video is currently a complement or a substitute for MVPD services, the online distribution of video is an "indispensable input, either as a component of a traditional linear offering or as an emerging substitute for it."[169] Commenters assert that even if OVDs are not a viable competitive alternative to MVPDs today, they will become one in the near future.[170] Thus, they contend, the Commission should impose conditions to ensure that Comcast-NBCU does not "choke off" the OVD industry in its infancy.[171]

78. *Discussion.* We conclude that Comcast-NBCU will have the incentive and ability to discriminate against, thwart the development of, or otherwise take anticompetitive actions against OVDs. OVDs offer a tangible opportunity to bring customers substantial benefits. They can provide and promote

[163] Applicants' Opposition at 182-84; Applicants' Reply at 25.

[164] Application at 100-101; Applicants' Opposition at 86-101; Applicants' Reply at 25-26.

[165] Application at 99-100; Applicants' Opposition at 86-92.

[166] Application at 100-101; Applicants' Opposition at 93-101.

[167] Applicants' Opposition at 93-96. The Applicants also argue that the OVD industry is a nascent industry and the Commission should not speculate as to how it might develop. This objection misses the point. Although the Commission must be mindful of uncertainty, it is under an obligation to ensure that this transaction does not unnecessarily harm online video. *See Horizontal Merger Guidelines* at 23, Section 6.4 Innovation and Product Variety.

[168] *See, e.g.*, Letter from Corie Wright, Free Press, to Marlene H. Dortch, Secretary, FCC, at 1 (Nov. 18, 2010); Letter from Donna Lampert, Counsel for EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, at 3 (Nov. 9, 2010).

[169] DISH Reply at 2.

[170] *See, e.g.*, FACT Reply at 9-10; DISH Petition at 2-9; ACA Comments at 4, 34-37; NJRC Reply at 9, 11-15; Public Knowledge Petition at 1-15; AOL Comments at 5-8; Free Press Reply at 6-11; Bloomberg Response at 14.

[171] Free Press Petition at 22. *See also* Reply to Comcast-NBC Universal Opposition, Communications Workers of America at 19-20 (filed Aug. 19, 2010) ("CWA Reply"); DISH Reply at 11-15; FACT Reply at 12-13; WGAW Comments at 17-19; AAI Comments at 16-17; AOL Comments at 5-8. Public Knowledge argues the Commission should be especially watchful of efforts to leverage market power in emerging markets. *See* Public Knowledge Petition at 3-4; *see also* EarthLink Petition at 12-14.

more programming choices, viewing flexibility, technological innovation and lower prices. The availability of OVD choices may also drive consumers to purchase broadband services where they have not already. New OVD services and new deals are announced seemingly daily. Comcast has an incentive to prevent these services from developing to compete with it and to hinder the competition from those that do develop.[172]

79. Whether viewers are "cutting the cord" has been examined by a multitude of studies.[173] Although the amount of online viewing is growing, the record indicates that cord-cutting is relatively infrequent. We therefore agree with the Applicants that most consumers *today* do not see OVD service as a substitute for their MVPD service, but as an additional method of viewing programming. We nonetheless conclude that Comcast has an incentive and ability to diminish the potential competitive threat from these new services for the reasons set forth below.

80. First, the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future.[174] By all accounts, OVD services have just begun. The growing popularity of online video, combined with the burgeoning technological options for viewing online video on television sets, is likely to heighten consumer interest in cord-cutting, provided a sufficient amount of broadcast and cable programming is replicated on the

[172] *See, e.g.*, Michael J. Angelakis, Chief Financial Officer, Comcast, Remarks at Goldman Sachs Communacopia XIX Conference at 3 (Sep. 22 2010) ("And when we think about cord cutting or sort of the flavor of the day, we look at that as primarily competition to our VOD business not to our core business."); 64-COM-00001504, **[REDACTED]**; 28-NBCU-0000005, **[REDACTED]**.

[173] *See, e.g.*, Cable & Telecommunications Association for Marketing, *84% of Web Video-to-TV Watchers Also Digesting More Regularly-Scheduled TV* (press release), Nov. 15, 2010 (commissioned research by Nielsen Co. shows only three percent of people who watch video from the Internet on their television sets planning to drop cable subscriptions; 84 percent watching as much or more regularly scheduled television than when they began watching streaming video); *Consumers Like Video Content from New Sources but Few Are Ready to "Cut the Pay-TV Cord," According to Survey*, ABI Research, Oct. 4, 2010 (concluding that "early indicators suggest online media will eventually compete with pay-TV" and stating that although only 13 percent of consumers surveyed said they would consider cancelling their pay-TV subscription, 32 percent expressed interest in watching online video on their television set, which is double the interest found in a 2008 survey); Craig Moffett, *Ruminations on Cord Cutting, Household Formation, and Memories of 2005*, Bernstein Research, Sept. 24, 2010 (finding the information regarding slower household formation to be inconclusive with respect to cord-cutting, but concluding that weak income growth could make pay-TV unaffordable and lead to a perception among consumers that alternative sources of video are "good enough"); *Communacopia Conclusions for Entertainment Investors*, Goldman Sachs, Sep. 24, 2010, at 1-6 (reporting that most entertainment companies attribute recent declines in video subscribers to economic factors and view cord-cutting as low risk, and predicting a greater threat to premium cable networks than to basic networks).

[174] *See, e.g.*, 64-COM-00002078, **[REDACTED]**; 11-COM-00000400, **[REDACTED]**; 64-COM-00000475, **[REDACTED]**; 28-NBCU-0000645, **[REDACTED]**.

Internet.[175] This effect may be more pronounced among younger consumers, the most frequent viewers of online video,[176] which could lead to a more significant rise in cord-cutting in the long term.

81. Second, even today OVDs may provide some competition for Comcast and affect the prices it charges consumers. For example, an OVD that rents or sells movies competes against Comcast's pay-per-view movie service and, hence, competes with Comcast for revenue. **[REDACTED]**[177] Comcast therefore has an incentive to deny that OVD access to NBCU content, including movies distributed by Universal Studios. If consumers have a choice for some of Comcast's services at a lower price, Comcast may be forced to lower its price in order to keep those customers.[178]

82. An OVD service may have become particularly attractive to those subscribers who watch some or all of their programming at times other than when it is originally aired.[179] As Comcast itself argues, more and more people want to watch programming when and where they want. Viewing is no longer limited to the television set at the times the programming is broadcast. Indeed, just 51 percent of all viewing is of scheduled television, the rest being made up of delayed viewing using digital video recorders ("DVRs"), on demand viewing, and Internet viewing.[180] This season, more than 10 percent of the total viewership of several popular shows has been via DVRs rather than through the scheduled broadcast.[181] The Nielsen Company estimates that between the second quarters of 2009 and 2010, the number of viewers watching television on a time shifted basis increased by 18 percent.[182] If viewers are

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[175] *See, e.g.*, Craig Moffett, *Ruminations on Cord Cutting, Household Formation, and Memories of 2005*, Bernstein Research, at 1 (Sept. 24, 2010) (finding the information regarding slower household formation to be inconclusive with respect to cord-cutting, but concluding that weak income growth could make pay-TV unaffordable and lead to a perception among consumers that alternative sources of video are "good enough").

[176] *See, e.g., The State of Online Video*, Pew Internet & American Life Project, Pew Research Center (Jun. 3, 2010), *available at* http://www.pewinternet.org/Reports/2010/State-of-Online-Video.aspx (finding that young adult Internet users, 18 to 29 year olds, continue to be the heaviest consumers of online video); 64-COM-00002078, **[REDACTED]**; 64-COM-00001760, **[REDACTED]**; *see also* 60-NBCU-0000443, **[REDACTED]**; Thomson Reuters StreetEvents, Final Transcript, "Verizon at Goldman Sachs Communicopia XIX Conference" at 8 (Sept. 23, 2010) (transcribing discussion with Ivan G. Seidenberg, Chairman and Chief Executive Officer of Verizon, in which he stated that "[y]oung people are pretty smart. They're not going to pay for something they don't have to pay for. So you've got to watch the market, over the top there is going to be a pretty big issue for cable.").

[177] *See* 64-COM-00000871, **[REDACTED]**; 64-COM-00000001, **[REDACTED]**; 25-COM-00000472, **[REDACTED]**; 31-COM-00001952, **[REDACTED]** 64-COM-00000478, **[REDACTED]**; *but see* 64-COM-00000519, **[REDACTED]**. *See also* Transcript, Discussion with Michael J. Angelakis, Chief Financial Officer and Exec. Vice President, Comcast Corp., Bank of America Merrill Lynch Securities Media, Communications and Entertainment Conference, at 13 (Sept. 15, 2010).

[178] Analysts agree that not all MVPD users need to switch to an OVD before it will have an effect on the MVPDs. *See, e.g.*, 11-COM-00000016, **[REDACTED]**. Comcast has recognized that OVDs may provide competition for its services. *See* 25-COM-0000017, **[REDACTED]**.

[179] *See, e.g.*, 64-COM-00001733, **[REDACTED]**; 60-NBCU-0000518, **[REDACTED]**; 64-COM-00003825, **[REDACTED]**; 60-NBCU-0001762, **[REDACTED]**.

[180] Morpace Omnibus Report at 2.

[181] *See* Lisa de Moraes, *"Hawaii Five-O's" Record-Breaking DVR Surge*, THE WASH. POST, Oct. 12, 2010, at C06 (reporting that "Hawaii Five-O" is "the most DVR'd show of all time").

[182] Nielsen Co., *State of the Media: TV Usage Trends: Q2 2010* (Nov. 2010).

able to watch television and other programming online, when they want, that service will compete against Comcast's DVR and on demand services and, as stated above, will have an effect on the number of people who subscribe to its traditional MVPD service.[183]

83. Third, we find no merit in the Applicants' argument that OVDs cannot replace Comcast's MVPD service (and thus Comcast has no incentive to discriminate against them) because the Internet lacks the capacity to deliver popular sports and other heavily watched programming. The evidence is to the contrary. In fact, Comcast's own documents belie its assertions.[184] Three of the major U.S. professional sports leagues already offer access to out-of-market games over the Internet. **[REDACTED]**.[185] Cablevision is starting to use its all-digital network to provide virtual DVR service to all of its customers: the recorded programs are stored at the cable head-end, not on the equipment in the customer's home.[186] Comcast uses the same type of digital platform. We conclude that if a cable system has the capacity to handle the playback of stored video by all its subscribers, it has the capacity to handle the streaming of a popular sports program. And if it does not, the cable system can be easily and inexpensively expanded.[187]

84. Fourth, we are unpersuaded by the Applicants' economic study that purports to show that they would have no economic incentive to withhold programming from OVDs after this transaction.[188]

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[183] A 2010 analyst report observes that a segment of consumers will purchase products with certain attributes, such as low price, simplicity, convenience, and flexibility, if their quality is "good enough." It provides examples such as free VoIP in place of traditional telephone service, Netbooks in place of laptop computers, and the Flip digital video camera in place of full featured camcorders. The report posits that, for certain consumers, the combination of Netflix and HD broadcast stations may be a "good enough" replacement for MVPD service. In this regard, it notes that approximately 48 percent of television viewing falls into programming categories—feature films, sitcoms, drama series, children's programming, varieties, game shows, and serials—that are available online. Spencer Wang, *Convergence 2010: Untangling the Future of Video*, Credit Suisse (undated) at 20-21, 61. *See also* Spencer Wang, *An Uncertain Time for Big Media: Downgrade to Underweight*, Credit Suisse (Sept. 16, 2010) at 18-29; 25-COM-0000594 **[REDACTED]**.

[184] *See* 64-COM-00000769, **[REDACTED]**.

[185] *See* 64-COM-00000769, **[REDACTED]**; 64-COM-00001467, **[REDACTED]**; 64-COM-00001470, **[REDACTED]**.

[186] Transcript, James Dolan, Chief Executive Officer, Cablevision Systems Corp., Bank of America Merrill Lynch Media Communications and Entertainment Conference at 5-6 (Sept. 16, 2010).

[187] *Id.* ("The HFC architecture . . . is a highly expandable architecture. . . . We've deployed a DOCSIS 3.0 platform. So we can keep putting capacity into our network at relatively small capital dollar investment and satisfy our customer needs.").

[188] Applicants – Israel/Katz May Report at 37-82. That study uses a similar framework to that employed by the Applicants to evaluate the profitability of MVPD foreclosure (which we analyze in detail in the Technical Appendix). The study is limited to analyzing the profitability of complete foreclosure from Comcast's content and does not address anticompetitive strategies that Comcast might employ to harm nascent or mature OVD rivals short of complete foreclosure, such as raising the price of its content, with which we are also concerned. We do not find it persuasive with respect to complete foreclosure because its results turn on arbitrary assumptions that are impossible to verify. The Applicants acknowledge that their online video study makes the "speculative" assumption that an OVD business will look much like a traditional MVPD, with comparable video content, rather than employing some other business model (*e.g.*, one limited to content in a specific genre, such as children's programming). *Id.* at 38. Its conclusions also depend on other speculative and unverifiable assumptions, including assumptions as to the

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Given that OVDs currently account for a small share of aggregate programming revenues, moreover, we question the assumption that refusing to sell content to OVDs that compete with the MVPDs to which the Applicants already sell content would cost the Applicants significant revenues today.[189]

85. Finally, despite their arguments in this proceeding, the Applicants' internal documents and public statements demonstrate that they consider OVDs to be at least a potential competitive threat.[190] The record here is replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it.[191] The record also contains NBCU e-mails and documents showing that many of the other cable companies are similarly concerned about the OVD threat and that NBCU feels pressure to avoid upsetting those companies with respect to any actions it might take regarding the online distribution of its content.[192] Comcast also publicly told the Commission in 2006 that the growth and popularity of online video is "certain to continue" and listed examples of online offerings by traditional broadcast and cable networks that it described as "providing consumers with an interactive alternative to traditional TV-set viewing."[193]

86. For all these reasons, we find that OVDs pose a potential competitive threat to Comcast's MVPD service, and that the Applicants therefore will have an incentive to take actions to hinder that

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proportion of OVD subscribers that would drop their service if they lost all Comcast and NBCU programming and the profits Comcast would earn from its MVPD customers in the event it faces competition from unaffiliated OVDs.

[189] We also reject Comcast's argument that the terms of its joint agreement with GE prevent it from sacrificing NBCU's revenues to gain profits for Comcast's cable systems. *See supra* ¶ 38.

[190] *See, e.g.*, Jeff Baumgartner, *Comcast Nears 'TV Everywhere' Launch*, LR Cable News Analysis, Sept. 9, 2009, at http://www.lightreading.com/document.asp?doc_id=181548&site=lr_cable&print=yes (visited Nov. 8, 2010) (quoting Steve Burke, Comcast Chief Operating Officer, "We have the exact same interests that the content providers have in making sure that we get ahead of the steamroller that is the Internet. . . . So many other businesses in the media space. . . didn't get ahead of it. Whether it is music or newspapers or radio, [they] didn't have a model that protected their core business, and then, boom, here comes the Internet as this destroyer of wealth."); Bloomberg Reply at 49 (citing past pleadings filed by Comcast and NBCU in Commission proceedings on the status of video programming competition in which the Applicants acknowledge the increasing influence of online video distribution); CWA Reply at 20 (same); FACT Reply at 9-10 (same). *See also* Free Press Reply at 7-12, Cooper/ Lynn Declaration at 5-11, 31-33 (citing documents); *but see* Letter from Michael D. Hurwitz, Willkie Farr & Gallagher LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 1-5 (Oct. 22, 2010) (arguing the documents are mischaracterized and taken out of context).

[191] *See, e.g.*, 64-COM-00002747, **[REDACTED]**; 64-COM-00000233, **[REDACTED]**; 64-COM-00003825, **[REDACTED]**; 64-COM-00002841, **[REDACTED]**; 64-COM-00001565, **[REDACTED]**; 64-COM-00002275, **[REDACTED]**; 64-COM-00000457, **[REDACTED]**; 64-COM-00001675, **[REDACTED]**; 64-COM-00001583, **[REDACTED]**; 64-COM-00001757, **[REDACTED]**.

[192] *See, e.g.*, 60-NBCU-0000776, **[REDACTED]**; 60-NBCU-0000632, **[REDACTED]**; 60-NBCU-00000550, **[REDACTED]**; 60-NBCU-0001688, **[REDACTED]**; 68-NBCU-0000387, **[REDACTED]**; 60-NBCU-0001687, **[REDACTED]**; 68-NBCU-0000182, **[REDACTED]**.

[193] *Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Comments of Comcast Corporation at 31 & n.121 (filed Nov. 29, 2006)("[A]s people increasingly connect computers to TV screens, networks like TheSailingChannel.com, JumpTV and Heavy.com may eventually challenge linear channels." (quoting David Goetzl, *Cracking the Market*, Broad. & Cable (Sept. 18, 2006))).

competition.[194] We disagree with the Applicants' argument that the JV's refusal to provide programming to OVDs would have no significant effect on OVDs' ability to compete. As discussed above, we find that the Applicants' withholding of linear programming, VOD rights, and online rights would have significant effects on the effectiveness of competition from rival MVPDs. Likewise, the Applicants' withholding of the online rights to similar NBCU programming would make OVDs less competitive.[195] If an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming. Comcast has strong incentives not to let this occur.[196]

87. Accordingly, we adopt targeted conditions, as detailed in Appendix A, to ensure that OVDs retain non-discriminatory access to Comcast-NBCU video programming, while permitting the continued evolution of the online market.[197] First, we require Comcast-NBCU to offer its video programming to any requesting OVD on the same terms and conditions that would be available to a traditional MVPD. To take advantage of this condition, an OVD will have to make the Comcast-NBCU programming available to its users as an MVPD would, which we expect typically will require the OVD to provide a linear video stream alongside any VOD content. By granting OVDs substantially similar rights to video programming as MVPDs, this condition generally protects them from discriminatory treatment aimed at keeping OVDs from competing directly with Comcast for video subscribers.

88. We also recognize, however, that many OVDs may wish to offer video services that differ from traditional MVPD service. Because the terms by which video programming vendors offer their programming to such services are unsettled and likely to change rapidly, we conclude that the best way to ensure that Comcast-NBCU treats such services fairly is to require it to offer its programming on terms comparable to those offered by its non-vertically integrated peers, which lack Comcast-NBCU's incentive to harm online providers. Specifically, once an OVD has entered into an arrangement to distribute programming from one or more Comcast-NBCU peers, we require Comcast-NBCU to make comparable programming available to that OVD on economically comparable terms.[198] This market-driven approach will ensure access to programming by OVDs as the online services develop, without prejudging the direction that dynamic market will take.

89. We provide for enforcement of these conditions by baseball-style arbitration. As set out more fully in Appendix A, this arbitration mirrors the program access procedures we have found effective for MVPDs, with slight adjustments to reflect differences in the relevant conditions. We also augment the

[194] Under our public interest review, we seek to ensure that market forces fairly determine the direction the industry will take, not to impose our view of how it should develop. In order to support the development of a competitive market, we analyze whether the transaction would allow Comcast-NBCU to take anticompetitive actions with regard to the emerging OVD services and impose conditions to prevent those actions.

[195] This is especially true of the online rights to NBC network programming and movies from Universal Studios, but also applies to online rights to the Applicants' other programming.

[196] *Cf.* 47 U.S.C. § 548 (Congress recognized the incentives of MVPDs to withhold programming from their rivals and determined that it was in the interest of both competition and viewers that such programming be made available to subscribers of rival MVPDs.); *Terrestrial Loophole Order*, 25 FCC Rcd at 761-75, ¶¶ 25-40 (Commission finding that despite Section 628, cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market).

[197] These conditions are based on the particular circumstances before us and do not bind the Commission in any other context, *see, e.g., In re High-Cost Universal Serv. Support et al.*, 51 Communications Reg. 434 at 5 n.37 (2010), and should not be construed as imposing specific requirements or procedures on an industry-wide basis.

[198] *See* Appendix A.

specific requirements governing online program access and other matters through a number of prohibitions against unfair practices and retaliatory conduct.

90. In addition, we impose conditions to foster the continued viability of Hulu, an emerging OVD in which NBCU was an original participant. We do not believe that Comcast-NBCU has the same incentives as pre-transaction NBCU to facilitate the ongoing development of Hulu, so we require Comcast-NBCU to hold its interest in Hulu solely as an economic interest. In other words, neither Comcast nor Comcast-NBCU shall exercise any right to influence the conduct or operation of Hulu, including that arising from agreements, arrangements or operation of its equity interests. Furthermore, we require Comcast-NBCU to contemporaneously renew its existing agreements with Hulu on substantially the same terms and conditions, provided that the other two content provider partners have renewed their agreements with Hulu, as explained in greater detail in Appendix A. Finally, provided that the other two content provider partners continue to provide Hulu with programming of a type, quantity and quality consistent with their practice during the one year period prior to the date of this Order, we require Comcast-NBCU to provide its programming to Hulu on an equivalent basis.

**d. Broadband Internet Access Service**

91. *Positions of the Parties.* Several commenters raise concerns that Comcast, in its capacity as a provider of Internet access services, will have an increased incentive to degrade the delivery of, or block entirely, traffic from the websites of other content providers or OVDs, or speed up access to their own content and aggregation websites.[199] These commenters argue that Comcast has demonstrated its ability to engage in network management practices that have a discriminatory effect on selected content, and retains the ability to use technologies such as deep packet inspection to discriminate between packets.[200] Some commenters argue that Comcast would also have an increased incentive to set usage caps that would penalize Comcast's broadband subscribers for viewing unaffiliated content, or for viewing content delivered by an unaffiliated OVD.[201]

92. While the Applicants note that the transaction "**[REDACTED]**,"[202] they contend that that the marketplace for online video is dynamic, vibrant, and competitive, and as a result is "particularly ill-

[199] AAI Comments at 21; AOL Comments at 4; Cooper Declaration at 128; Sen. Franken Letter at 4, 9; Rep. Johnson Comments at 2; WGAW Comments at 18; Bloomberg Petition at 43-44; DISH Petition at 19; EarthLink Petition at 22; Free Press Petition at 28-29 and Cooper/Lynn Declaration at 22-23; Greenlining Petition at 40-41; Public Knowledge Petition at 6, 8-10; WealthTV Petition at 22; Bloomberg Response at 15-16; Bloomberg Reply at 47, 54; DIRECTV Reply at ii, 8; DISH Reply at 2-3, 5-7, 23; EarthLink Reply at 2, 14, 18; NJRC Reply at 14, 30. The American Antitrust Institute argues that the transaction will increase Comcast's incentive to limit competition between two platforms (or systems): content delivered through MVPDs and content delivered online. AAI Comments at 17. This contention raises two concerns involving the foreclosure of emerging non-MVPD rivals to post-transaction Comcast: foreclosure from access to online video content (input foreclosure), which we address in section V.A.2.c, and foreclosure from access to broadband subscribers (customer foreclosure), which we address here.

[200] *See* AAI Comments at 21; Cooper Declaration, Marvin Amori Study at 3; FACT Comments at 27; Sen. Franken Letter at 9; Bloomberg Petition at 43-44; DISH Petition at 9-12 and Jackson Declaration at ¶ 15; EarthLink Petition at 37; Free Press Petition – Cooper/Lynn Declaration at 27-29; Greenlining Petition at 40-41; Public Knowledge Petition at 4-5; WealthTV Petition at 21; Bloomberg Response at 16; NJRC Reply at 29-30.

[201] *See* ACD Comments at 6; DISH Petition at 20 and Jackson Declaration at ¶ 15; Bloomberg Response at 16-17.

[202] 64-COM-00000283, **[REDACTED]**.

suited for government regulation or transaction conditions."[203] Elsewhere, Comcast has affirmed its "unwavering commitment" to operate its broadband Internet access service in accordance with certain basic principles.[204]

93. *Discussion.* Although we agree with the Applicants that these concerns affect all ISPs,[205] we also identify particular transaction-related harms that arise from the increased risk that Comcast will engage in blocking or discrimination when transmitting network traffic over its broadband service. Specifically, we find that Comcast's acquisition of additional programming content that may be delivered via the Internet, or for which other providers' Internet-delivered content may be a substitute, will increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections. Post-transaction, Comcast will gain control of NBCU **[REDACTED]**,[206] which is composed primarily of video programming assets. Comcast-NBCU will also control a 32 percent interest in Hulu,[207] the second most-watched source of online video[208] and the **[REDACTED]**.[209] Comcast-NBCU will have a roughly five percent share of the market in online video distribution sites.[210] Few other OVDs control such a high percentage of the content they distribute, and no others are vertically integrated with the nation's largest residential broadband provider. Furthermore, if Comcast or Comcast-NBCU were to discriminate against disfavored online content or distributors after the transaction, that conduct could render our online program access conditions ineffective.

94. To address these transaction-related concerns, the Applicants have offered a number of voluntary commitments. The Applicants have agreed that, in their provision of broadband Internet access services, neither Comcast nor Comcast-NBCU shall prioritize affiliated Internet content over unaffiliated Internet content.[211] In addition, any Comcast or Comcast-NBCU broadband Internet access service offering that involves caps, tiers, metering, or other usage-based pricing shall not treat affiliated network traffic differently from unaffiliated network traffic. Comcast and Comcast-NBCU shall also comply with all relevant FCC rules, including the rules adopted by the Commission in GN Docket No. 09-191,[212] and, in the event of any judicial challenge affecting the latter, Comcast-NBCU's voluntary commitments concerning adherence to those rules will be in effect.[213]

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[203] Applicants' Opposition at 7.

[204] *Id.* at 7, 193-95.

[205] *Id.* at 196.

[206] 64-COM-00001613, **[REDACTED]**.

[207] Application at 8-9.

[208] CWA Reply at 21-22 (citing comScore, Inc. *U.S, Online Video Market Continues Ascent as Americans Watch 33 Billion Videos in December* (press release), Feb. 5, 2010). In November 2009, Hulu accounted for **[REDACTED]**. 64-COM-00000214, **[REDACTED]**.

[209] 64-COM-00002018, **[REDACTED]**.

[210] *See* Application at 123.

[211] Letter from Kathy A. Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Jan. 17, 2011).

[212] *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, FCC 10-201 (rel. Dec. 23, 2010).

[213] We will rely upon Comcast-NBCU's agreement to adhere to the terms of the Open Internet rules, including

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95. Some services, such as IP-enabled "cable television" delivery, may be provided to end-users over the same facilities as broadband Internet access service, but may be classified as Specialized Services (as defined in Appendix A) distinct from broadband Internet access services. We prohibit Comcast and Comcast-NBCU from offering a Specialized Service that is substantially or entirely comprised of affiliated content. If Comcast or Comcast-NBCU offers any Specialized Service that makes content from one or more third parties available to (or that otherwise enables the exchange of network traffic between one or more third parties and) Comcast or Comcast-NBCU subscribers, Comcast-NBCU shall allow any other comparable third party to be included in a similar Specialized Service on a nondiscriminatory basis.

#### e. Set-Top Boxes

96. *Positions of the Parties*. Another potential point of discrimination raised by commenters involves next generation, IP-enabled set-top boxes ("STBs"). Unlike previous generations of STBs that were used only for the delivery of video programming provided over the consumer's MVPD service, IP-enabled STBs allow subscribers to view both MPVD programming and online video programming on their television screens regardless of whether the programming is affiliated with their MVPD. These STBs can be purchased from a third-party vendor,[214] but they are more frequently rented from the MVPD.[215] Commenters have raised the concern that Comcast could prevent or hinder subscribers to competing MVPD services and Comcast broadband from viewing IP content using a Comcast-provided CPE device,[216] while allowing Comcast MVPD subscribers to do so.[217]

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submission to enforcement by the Commission. This agreement contains voluntary, enforceable commitments but is not a general statement of Commission policy and does not alter Commission precedent or bind future Commission policy or rules. *See, e.g., In re Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972, 5984 n.79 (2010); *In re Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745 n.29 (2009).

[214] CWA suggests that in order to ensure consumers can obtain Internet access on their television sets, we should bar Comcast-NBCU from tying the purchase of MVPD service to the purchase of a Comcast STB, and instead compel the company to permit its cable television subscribers to purchase a STB from an independent provider. CWA Petition at 56-57; *see also* NJRC Reply at 28, 44. We find this condition unnecessary, as subscribers to Comcast MVPD service currently do not purchase STBs directly from Comcast, *see* Comcast June Response at 95-96, and there is no indication in the record that Comcast has restricted the ability of consumers to purchase STBs of their own choosing. Seattle *et al.* Municipal Commenters have raised concerns regarding the rates charged to Comcast subscribers for STB rental. Seattle *et al.* Municipal Commenters Comments at 4-5, 19; *see also* NJRC Reply at 43 (supporting recommendation that basic-only subscribers should be charged the lowest rate available for set-top devices). But as there is no evidence in the record that Comcast's acquisition of NBCU will change those rates, we find that those concerns are not transaction-related and thus not appropriate to address in the context of this Order.

[215] The vast majority of STBs are leased, rather than purchased by the consumer. *See* National Broadband Plan, § 3.2 at 18.

[216] CPE in this context refers to equipment that is located in a consumer's home that connects to a broadband connection, such as modems, routers, or other end-user devices.

[217] DISH Petition at 21-22. FACT alleges that Comcast disables the online function for digital video subscribers using TiVo-brand DVRs. FACT Reply at 11-12. This concern is addressed by the conditions imposed above, which would prevent Comcast from the blocking, degrading, or discriminatory display of search results for Internet content by a Comcast-supplied STB.

97. *Discussion.* We are concerned that to protect its newly increased holdings in affiliated video programming, Comcast will have a heightened incentive to harm video distribution competition by using its new IP-enabled STBs to discriminate against online content that its MVPD subscribers attempt to view via the STB. To address this concern, the Applicants have made a voluntary commitment. The Applicants have agreed that, to the extent that a Comcast-affiliated STB (and/or CPE or software that is functionally equivalent to a STB)[218] has a capability that enables a customer to receive broadband Internet access service, the requirements described in paragraph 94 shall apply. In addition, to the extent that a Comcast-affiliated STB has a capability that enables a consumer to access a Specialized Service, the requirements described in paragraph 95 shall apply. We thus will ensure that any Comcast-affiliated STB accesses and displays unaffiliated content from the public Internet or over a Specialized Service in a non-discriminatory manner.[219]

98. As an example, to the extent a Comcast-affiliated STB is capable of accessing any portion of the public Internet, the STB cannot permit users to access content available on nbc.com, but prevent access to content available on abc.com. This does not mean that STBs would be required to provide access to the public Internet, but if Comcast-supplied STBs do allow consumers public Internet access, it must be offered in a non-discriminatory manner that is compliant with the broadband Internet access service rules described in paragraphs 94 and 95.

99. In addition, if Comcast-affiliated STBs employ a search function to navigate programming on the public Internet, they must display search results in a non-discriminatory manner. For example, the STB may not return non-affiliated search results for "action adventures" but display them after all the results for Comcast-NBCU affiliated programming without a reasonable basis for doing so. This requirement does not require the Applicants to use any particular methodology for their search results. They must only be able to establish that the system used is based on a non-discriminatory approach consistently applied (*e.g.*, alphabetical, ratings). And after public Internet content is located and selected, any Comcast-affiliated STB must deliver that content in a non-discriminatory manner. At a minimum, any non-affiliated content must not be blocked or degraded in comparison to affiliated content.[220]

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[218] To address concerns that Comcast could hinder subscribers to competing MVPD and Comcast broadband services from viewing content using a Comcast-provided CPE device, all of the conditions that we impose here on STBs also apply to Comcast-provided CPE devices that perform the function of a STB (for example, any CPE device that Comcast provides to allow a gateway device to act as a STB). In addition, to the extent Comcast provides software that is functionally equivalent to a STB and allows customers to view Comcast video programming—such as a widget on an Internet-capable TV or an application on an iPad or other viewing device—this software also is subject to these conditions.

[219] *See* DISH Petition at 19; NJRC Reply at 30.

[220] *See* 25-COM-00000575, **[REDACTED]**. The Applicants have agreed not to attempt to create a competitive advantage for an affiliated station post-transition by forcing or automatically tuning STBs to a local, in-market NBCU station. *See* ABC/CBS/Fox Comments at 3; ABC, CBS, and Fox Affiliates Agreement at 1-2. Delay of delivery of video programming is permissible to the extent that it is technically necessary because of STB functions.